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# Practice and Procedure

George K. Lyall

Fred L. Kingsmore Jr.

# PRACTICE AND PROCEDURE

## I. Supplemental Jury Instructions Reversible Error if They Expressly Require Jury to Reach Verdict

In *Crim v. Shirer*,[1] the South Carolina Supreme Court held that supplemental jury instructions[2] urging agreement on an award of damages were prejudicial because the instructions suggested to the jury that they would not be excused until an agreement was reached on the amount of the damage award. Conceding that the issue was close, the court reversed and remanded the case for a new trial[3] without establishing useful guidelines for the bench as to the permissible scope of supplemental instructions which urge the jury to agree on a verdict.

In this case, the plaintiff sought damages for alleged slander and assault and battery by the defendant.[4] During the course of the trial, the judge dismissed the slander cause of action and directed a verdict for the plaintiff on the issue of liability in the assault and battery claim. The only question submitted to the jury was the amount of damages to be awarded to the plaintiff. Less than two hours after retiring, the jury informed the court

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1. 278 S.C. 639, 300 S.E.2d 731 (1983).

2. The court quoted as follows the portion of the trial judge's instructions held to be prejudicial:

> Now, what we're going to do is that we're going to stay here just as long as it takes for us to come up with some form of verdict because we're not going to spend a day and a half of the Court's time next week with twelve more jurors on this particular case. We're going to reach a verdict of a type that speaks the truth and involves the collective wisdom of the twelve of you, and I'm not asking any of you to abandon a feeling or a belief that you feel that you just cannot part with, but this case isn't a criminal case, where I wouldn't stress that you give and take. We're not dealing here with guilt or innocence of an individual. What you have to decide is one question, and that's simply an amount of money.
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> . . .
>
> We'll make you as comfortable as possible, but we want this litigation ended, and you twelve ladies and gentlemen, no question in my mind, you're the ones to do it.

*Id.* at 641, 300 S.E.2d at 732.

3. *Id.*, 300 S.E.2d at 733.

4. *Id.* at 640, 300 S.E.2d at 731.

that it could not reach a verdict. The jury was brought into the courtroom and the instructions in question were given.[5] The jury then deliberated for an additional hour and reached a verdict in favor of the plaintiff for $500.00 actual and $10,000.00 punitive damages.[6]

In reversing this judgment, the supreme court noted that it was well within the discretion of the trial judge to urge a jury to agree on a verdict[7] and that the judge in this case was obviously motivated by good intentions.[8] The court ruled, however, that the likelihood of prejudice was sufficiently strong to compel reversal of the verdict. The court held that a judge must not attempt to coerce or force the jury to agree upon a verdict or any particular verdict. While the judge may advise and persuade, the court continued, he or she may not say or do anything to force a decision. Determining that the instructions clearly intimated that the jury could not be excused until an amount was agreed upon,[9] the court apparently felt that the jury was subjected to directions which operated improperly to coerce them to reach an agreement.

The court in *Crim* cites as authority for its decision two sections of the second edition of *American Jurisprudence*.[10] As is typical of legal encyclopedias, these passages are general in nature, providing little guidance to the bench's formulation of proper jury instructions. However, *Crim* clearly constitutes a significant change in South Carolina law. Prior case law is replete with instructions, approved by the supreme court as within the discretion of the trial judge, which appear to constitute more egregious attempts to coerce the jury than did the instructions in *Crim*.[11] In its order, the lower court in *Crim* cited several South Carolina cases which in its opinion were controlling authority, and concluded that the instructions were well within the

5. *Id.*
6. *Id.* at 640-41, 300 S.E.2d at 731.
7. *Id.* at 642, 300 S.E.2d at 732.
8. *Id.* at 643, 300 S.E.2d at 733.
9. *Id.*, 300 S.E.2d at 732.
10. 76 AM. JUR. 2D *Trial* §§ 1054-55 (1975).
11. *See, e.g.*, Nelson v. Atlantic Coast Line R.R., 191 S.C. 345, 4 S.E.2d 273 (1939); Coleman v. Stevens, 124 S.C. 8, 117 S.E. 305 (1923); Terry v. Richardson, 123 S.C. 319, 116 S.E. 273 (1923); Harper v. Abercrombie, 115 S.C. 360, 105 S.E. 749 (1921); Caldwell v. Duncan, 87 S.C. 331, 69 S.E. 660 (1910); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910); Nickles v. Seaboard Airline Ry., 74 S.C. 102, 54 S.E. 255 (1906).

boundaries established by those cases.[12] As will be shown, prior to this case the available case law rejected arguments of jury coercion in appeals involving a wide variety of instructions.

Within six weeks in 1921, the South Carolina Supreme Court affirmed two sets of supplemental instructions which would appear to be outside the rule developed in *Crim.* In the first of those cases, *Terry v. Richardson*,[13] the trial judge stated that he regreted having to keep a jury confined in the jury room, but that it was the only way known to the law to get a verdict. On appeal, the supreme court stressed that no language in the instructions could fairly be construed as encouraging a surrender of the jurors' conscientious convictions merely for the purpose of agreement.[14] The court stated that, "While a . . . judge may not coerce a jury, he is not precluded from indicating very plainly that he will not be coerced by the jury."[15]

In the second case, *Coleman v. Stevens*,[16] the trial judge drew an analogy between the jury's failure to reach a verdict and an army regiment's inability to perform its duty in time of war.[17] In addition, the judge admonished the jury that if the truth was so elusive that twelve men could not ascertain it after deliberating, then perhaps they had all lapsed back into the ages from which they came.[18] The supreme court, affirming the supplemental instructions, stressed the importance of reviewing instructions in their entirety, noted the absence of an express command that the jury agree, and concluded by refusing to endorse the general proposition that moral persuasion to discharge an im-

12. In his order, the trial judge specifically mentioned the following cases as illustrative of the law: *Nelson*, 191 S.C. 345, 4 S.E.2d 273 (1939); *Terry*, 123 S.C. 319, 116 S.E. 273 (1923); Fairey v. Hanes, 107 S.C. 115, 91 S.E. 976 (1917); State v. Shuman, 106 S.C. 150, 90 S.E. 596 (1916). Record at 156. *Nelson* and *Terry* are discussed in the text. The trial judge in *Fairey* threatened to jail the jury if they could not agree and a divided court held that that threat was coercive. 107 S.C. at 117, 91 S.E. at 976. The trial judge in *Shuman* told the jury to deliberate for three weeks if necessary and stated that no jury would declare a mistrial on him unless they wanted to go to jail. 106 S.C. at 152, 90 S.E. at 597.

13. 123 S.C. 319, 116 S.E. 273 (1923).

14. *Id.*, 116 S.E. at 275.

15. 123 S.C. at 327, 116 S.E. at 276 (quoting State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922)).

16. 124 S.C. 8, 117 S.E. 305 (1923).

17. *Id.* at 16-17, 117 S.E. at 308.

18. *Id.* at 17, 117 S.E. at 308.

portant duty may be so strong as to constitute error of law.[19]

A more recent case, *South Carolina Public Service Authority v. Spearwant Liquidating Co.*,[20] noted that it was the trial judge's duty to admonish the jury of the desirability and importance of trying to reconcile their differences and to agree upon a verdict.[21] Because the trial judge is exposed to the entire atmosphere of the trial and is cognizant of all the facts and circumstances developed during the trial, the supreme court declined to interfere with the judge's exercise of discretion unless clear abuse was shown.[22]

The decision in *Crim* is an attempt by the supreme court to update its position on instructions urging agreement. Those instructions which may be fairly understood as a threat that the jury will not be excused until it reaches a verdict are prejudicial and constitute reversible error. The court made no mention of a need to review the instructions in their entirety; therefore, comments by the judge which tend to reinforce the jury's independence, such as "I'm not asking any of you to abandon a feeling or belief,"[23] may not suffice to cure the prejudicial effect of the instructions. Nor did the court recognize a difference between deliberations on guilt or liability and deliberations involving only the amount of damages,[24] impliedly rejecting instructions which stress the desirability and importance of agreement by minimizing the importance of a particular verdict. Consequently, if the judge's charge expressly commands the jury to reach a verdict upon pain of indefinite detention, the charge is improperly coercive.

The supreme court has attempted to divorce itself from the not-so-subtle moral persuasion allowed by the court in years past. Although after *Crim* it still remains within the discretion of the trial judge to urge a jury to agree on a verdict,[25] the line

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19. *Id.*

20. 196 S.C. 481, 13 S.E.2d 605 (1941)(quoting Dover v. Lockhart Mills, 86 S.C. 229, 68 S.E. 525 (1910)).

21. 196 S.C. at 490, 13 S.E.2d at 608.

22. *Id.*

23. 278 S.C. at 641, 300 S.E.2d at 732.

24. The trial judge stated that, "We're not dealing here with guilt or innocence of an individual. What you have to decide is one question, and that's simply an amount of money." *Id. See also* Nickles v. Seaboard Airline Ry., 74 S.C. 102, 54 S.E. 255 (1906).

25. 278 S.C. at 642, 300 S.E.2d at 732.

between persuasion and coercion is a fine one. *Crim* was admittedly a close call by the court, and the opinion leaves judges with nothing more than passages from a legal encyclopedia to use as a guide by which to frame instructions urging a verdict. While the simple solution may seem to be the less said the better, problems of docket control and allocation of judicial resources demand that trials end in a verdict whenever possible. It is hoped that future opinions will delineate the precise limits of the trial judge's discretion so that the bench may advise and admonish the jury to reach a verdict without committing reversible error.

*George K. Lyall*

## II. FIDUCIARY SHIELD DOCTRINE: NOT A LIMITATION ON SOUTH CAROLINA LONG-ARM STATUTE

The Fourth Circuit Court of Appeals examined the so-called "fiduciary shield" doctrine in *Columbia Briargate Co. v. First National Bank In Dallas*.[26] The court held that the "fiduciary shield" doctrine, which has been held in some jurisdictions to preclude the exercise of individual personal jurisdiction over an agent of a nonresident corporation, poses no limitation on South Carolina's long-arm statute.[27]

The litigation arose out of the sale of an apartment complex in Columbia, South Carolina. The plaintiff-purchaser was a California limited partnership. The defendants included the First National Bank In Dallas and its vice president, Vaughn Pearson. The plaintiff alleged that, during negotiations for the sale of the apartments by the bank to the plaintiff, the defendant vice president made false and fraudulent representations about the condition of the apartments to the plaintiff. The defendants were served with process under the South Carolina long-arm statute, and the defendant bank was dismissed for improper venue.[28]

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26. 713 F.2d 1052 (4th Cir. 1983). The case was on appeal from the United States District Court for the District of South Carolina, at Columbia.

27. S.C. CODE ANN. § 36-2-803 (1976).

28. Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation had been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is

Thus, the remaining issue, whether Pearson was subject to personal jurisdiction in the South Carolina District Court, depended on the court's interpretation of the fiduciary shield doctrine.

Pearson argued that he was immune from service of process under the South Carolina long-arm statute because of the operation of the fiduciary shield doctrine, even though it was conceded that he was personally substantively liable for the tort.[29] The fiduciary shield doctrine has been recognized by some jurisdictions (primarily New York and the Second Circuit) as a limitation on state long-arm statutes, precluding the exercise of individual personal jurisdiction over an agent of a nonresident corporate defendant whose conduct in his corporate capacity in the forum state becomes the subject of a lawsuit.[30] In holding Pearson subject to personal jurisdiction, the Fourth Circuit found that the fiduciary shield doctrine is not a constitutional principle, but rather a narrow equitable principle of construction of state long-arm statutes, applicable only in jurisdictions where the statute does not extend to the utmost limits of due process.[31] Therefore, the fiduciary shield doctrine is not applicable in South Carolina where the long-arm statute, unlike the New York long-arm statute, extends jurisdiction over a nonresident "to the outer perimeter allowed by due process."[32]

The court offered a general rule which would allow its decision in the instant case and the Second Circuit decisions to be

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located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located.

12 U.S.C. § 94 (Supp. IV 1982).

29. Under the controlling South Carolina law, "[a]n agent's liability for his own tortious acts [in such an action is plain and] is unaffected by the fact that he acted in his representative capacity." 713 F.2d at 1054 (quoting Lawlor v. Scheper, 232 S.C. 94, 98-99, 101 S.E.2d 269, 271 (1957)). The application of the fiduciary shield doctrine would yield inconsistent results: a resident agent would be liable for torts committed in a corporate capacity but a nonresident agent who had committed the same tort while in the state, but who had since left, would be immune from service. 713 F.2d at 1059.

30. *See, e.g.*, Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981).

31. "New York had not 'sought to obtain [under its long-arm statute] full *in personam* jurisdiction over nondomiciliaries who transact business within its boundaries.'" 713 F.2d at 1056 (quoting United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir. 1966)).

32. O'Neal v. Hicks Brokerage Co., 537 F.2d 1266, 1268 (4th Cir. 1976).

read together. The court noted that the Second Circuit decisions which are typically "cited as illustrative of the application of the doctrine as a constitutional principle . . . rested expressly upon the fact that the agent had not actually and individually participated in a tort in the forum state."[33] Other courts have recognized that even in states where the fiduciary shield doctrine is applicable, a nonresident agent who actually commits a tort while in the forum state is amenable to jurisdiction in that state.[34] Thus, as a general proposition, a nonresident corporate agent who actually commits a tort in his corporate capacity within the forum state is individually amenable to service of process, "*provided the long-arm statute of the forum state is co-extensive with the full reach of due process.*"[35] Conversely, if the agent's only connection with the tort was outside the forum state, he is not amenable to service of process as an individual under the state long-arm statute.[36]

The opinion concluded with a discussion of the equitable nature of the fiduciary shield doctrine. In dicta, the court noted that the result would have been the same even if the fiduciary shield doctrine were applicable in South Carolina. In those states which have recognized the fiduciary shield doctrine, the rule is not a mechanical device, but rather an equitable principle to be applied or not applied as the equities between the parties may require. Because the bank was immune from suit in South Carolina and its agent was the only tortfeasor amenable to the forum court's jurisdiction, the equities in *Columbia Briargate Co.* favored the plaintiff.[37]

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33. 713 F.2d at 1061. This rationale was first developed in Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F. Supp. 171, 182 (D. Idaho 1976).

34. *See* Kinstler v. Saturday Evening Post Co., 507 F. Supp. 113, 115 (S.D.N.Y. 1981); Agra Chem. Distrib. Co. v. Marion Laboratories, Inc., 523 F. Supp. 699, 703 (W.D.N.Y. 1981).

35. 713 F.2d at 1064 (emphasis by court).

36. *Id.* This formulation equates amenability to long-arm jurisdiction with substantive liability in tort of the agent, and avoids the inconsistencies mentioned *supra* note 29. Under the rules formulated by the Fourth Circuit, a corporate agent is immune from suit on an alleged tort under both general corporate law and the state long-arm statute unless the agent actually committed the tort within the forum state. Thus, if liable substantively, the agent will also be subject to jurisdiction under the forum state's long-arm statute, provided that statute reaches to the full extent of due process. *See* Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980); *Cf.* Hyatt Int'l Corp. v. Inversiones Los Jabillos, C.A., 558 F. Supp. 932 (N.D. Ill. 1982).

37. If the corporate defendant is not responsive, it is possible that the fiduciary

For the South Carolina practitioner, the fiduciary shield doctrine appears to be a dead letter, except, of course, when a client is served in his corporate capacity under another state's long-arm statute and that statute is *not* as broad as due process itself. Because of conflict among the circuits, the United States Supreme Court will probably decide the issue eventually. For the present, the Fourth Circuit decision stands, and it is unlikely that the South Carolina Supreme Court will decide any differently should the question be presented to it. Therefore, it appears that the fiduciary shield doctrine will not immunize defendants against service under the long-arm statute of South Carolina.

*Fred L. Kingsmore, Jr.*

## III. DAMAGE CLAIM ALLOWED IN A CLASS ACTION

In *Miller v. Borg-Warner Acceptance Corporation*,[38] the South Carolina Supreme Court addressed the joinder provisions of the South Carolina Code.[39] The court held that two causes of action, one brought individually and one brought as a class action, could be joined under section 15-15-10. The decision may be more important for its implications than for its express holding.

*Miller* arose when the appellant financed a mobile home through the respondent finance company. Appellant's original complaint alleged that respondent assessed delinquency charges in violation of the South Carolina Code[40] and charged an amount in excess of that allowed by statute.[41] The complaint

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shield doctrine may be disregarded. Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981). *Cf. Bulova Watch*, 508 F. Supp. at 1347-50, where the court, in balancing the equities of the parties, found that, because the corporate defendant was amenable to jurisdiction, the equities favored the agent.

38. 279 S.C. 90, 302 S.E.2d 340 (1983).

39. S.C. CODE ANN. § 15-15-10 (1976) provides in pertinent part: "The plaintiff may unite in the same complaint several causes of action . . . when they all arise out of: (1) The same transaction or transactions connected with the same subject of action. . . . But the causes of action so united must . . . affect all the parties to the action. . . ."

40. S.C. CODE ANN. § 37-2-203 (Supp. 1983) governs delinquency charges on consumer credit sales.

41. 279 S.C. at 92, 302 S.E.2d at 340. Appellant was late in paying an installment and respondent assessed a delinquency charge. Appellant made payments on time thereafter but never made up the missed payment. Respondent's policy was to apply each

stated two causes of action. The first, which was brought individually, sought the return of alleged excess charges, plus a statutory penalty for each alleged violation. The second cause of action was brought by appellant as a class action on behalf of herself and all persons similarly situated, as permitted under the South Carolina Code,[42] and sought only the return of the alleged illegal charges. Common to both counts was a prayer that the respondent be enjoined from further violations of the statute governing consumer credit transactions.

Two issues appear to have been raised on appeal: (1) whether the two counts contained in the complaint were properly joined, and (2) whether the second count could proceed as a class action. The court conceived the case differently, however, noting that the only real issue was whether the two causes of action were properly joined in one complaint.[43] The court concluded that the two causes of action could be joined under section 15-15-10 of the Code.[44] However, the real significance of this case may lie in the court's underlying assumptions. The court observed: "We are of the opinion that either cause of action standing alone would be proper."[45] The court also stated: "If any reason exists as to why the case should not proceed as a class action, it does not appear on the face of the complaint."[46] These statements indicate that the court's only concern was with joinder, and that the court had no objection to the second cause of action proceeding as a class action.

This approach is in stark contrast to previous decisions concerning class actions. Three general theories have been used to

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payment received to the previous month's default so that appellant was assessed a late charge every month, although only one payment was late. Appellant alleges that because South Carolina law allows only the default charge imposed on the original missed payment, respondent violated S.C. CODE ANN. § 37-2-203 (Supp. 1983), entitling appellant to recover the wrongful charges and the penalty of "not less than $100 nor more than $1000" imposed by S.C. CODE ANN. § 37-5-202(3) (Supp. 1983). This penalty is expressly made unavailable in class actions.

42. S.C. CODE ANN. § 15-5-50 (1976) provides: "When the question is one of a common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

43. 279 S.C. at 93, 302 S.E.2d at 341.

44. The court allowed the joinder under S.C. CODE ANN. § 15-15-10(1)(text set out *supra* note 39).

45. 279 S.C. at 93, 302 S.E.2d at 341.

46. *Id.*

satisfy the joinder requirement in class action suits. For a class action to be allowed, class members have traditionally been required to show at least one of the following elements: (1) some prior legal or organizational bond among class members; (2) an interest in a common fund; or (3) an interest in a common form of relief.[47] Class action suits have traditionally been denied when actual damages, in addition to equitable relief, are sought on behalf of the class.[48] In *Miller*, however, the court allowed the class action to proceed even though both damages and equitable relief were sought. In making this decision, the court reasoned that the instant case was primarily an equitable action to halt defendant's illegal actions and that the damage claims were ancillary to the main action.[49] Future cases will reveal the extent of the court's willingness to ignore claims for monetary relief and to characterize the action as primarily equitable in nature. A potential class plaintiff's chances of success will be greatly increased if he can characterize the monetary relief as restitutionary or rescissionary.[50]

In deciding this case, the court, through the use of its equitable powers, has taken the first step toward allowing a damage award in a class action. However, this may be a limited step, considering that the monetary relief sought in *Miller* was restitutionary in nature and could be easily determined by an examination of the books of the finance company. The court may not allow a class action where the determination of class damages would be more complicated or subjective,[51] or where such damages would be more in the nature of pure damages with no restitution involved. Obviously the court would be less inclined to

47. For an extensive discussion of class actions in South Carolina, see Note, *State Class Actions*, 27 S.C.L. REV. 87 (1975).

48. *See* Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 (1973); Benjamin v. South Carolina Nat'l Bank of Charleston, 269 S.C. 250, 237 S.E.2d 72 (1977).

49. 279 S.C. at 92, 302 S.E.2d at 341. Exactly this characterization was foreseen in Note, *supra* note 47, at 112.

50. "[O]nce equity jurisdiction obtains, the court administers complete relief even if that includes establishing purely legal rights which are otherwise beyond the scope of its authority." Note, *supra* note 47, at 112 n.85 (construing Parker Peanut Co. v. Felder, 207 S.C. 63, 34 S.E.2d 488 (1945)).

51. In the past, the court's aim "has been the avoidance of administratively burdensome . . . types of class litigation in which separate determinations of some sort must be made in regard to each class member." Brief of Respondent at 11-12, *Miller*. The conflicting policy concerns are the "avoidance of a multiplicity of suits [and] inconsistent judgments as well as judicial economy and efficiency." Note, *supra* note 47, at 112 n.85.

allow a class action in which damages are the primary relief sought because the action would not be "primarily equitable in nature,"[52] and would therefore fall outside the *Miller* rationale.[53]

*Fred L. Kingsmore, Jr.*

## IV. INTEREST ON JUDGMENTS: NEW RATES APPLY TO UNSATISFIED PORTION OF JUDGMENT AS OF AMENDMENT'S EFFECTIVE DATE

In *Southeastern Freight Lines v. Michelin Tire Corp.*,[54] the South Carolina Supreme Court held that an amendment to a statute increasing the legal rate of interest on judgments applies to judgments entered before the effective date of the amendment, to the extent that such judgments remain unsatisfied as of the effective date of the change.[55] This issue was certified to the court by the United States District Court for the District of South Carolina[56] pursuant to Rule 46[57] of the rules of practice of the South Carolina Supreme Court. The court's holding puts South Carolina in accord with the majority of jurisdictions.[58]

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52. *See supra* note 49.

53. "In federal practice, certification of the class occurs at a different time and subsequent to rulings on the adequacy of the complaint, and that practice has been impliedly adopted by this Court." Reply Brief of Appellant at 5-6, *Miller* (construing Knowles v. Standard Sav. and Loan Ass'n, 271 S.C. 217, 246 S.E.2d 879 (1978) and O'Quinn v. Beach Assoc., 272 S.C. 95, 249 S.E.2d 734 (1978)). However, the court's allowing the complaint to state a cause of action for class damages is still a major departure from past decisions.

54. 279 S.C. 174, 303 S.E.2d 860 (1983).

55. *Id.* at 175, 303 S.E.2d at 861.

56. *Id.*

57. Section 1 of Rule 46 of the Rules of the South Carolina Supreme Court provides:

> The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

S.C. SUP. CT. R. 46, § 1.

58. *See, e.g.*, Morley v. Lake Shore and Michigan Southern Ry. Co., 146 U.S. 162 (1892); Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp., 684 F.2d 1383 (11th Cir. 1982); Glades County v. Kurtz, 101 F.2d 759 (5th Cir. 1939); Mayor and City Council of Baltimore v. Kelso Corp., 294 Md. 267, 449 A.2d 406 (1982); McBride v. Superior Court of County of Maricopa, 130 Ariz. 193, 635 P.2d 178 (1981); Senn v. Commerce-Manchester Bank, 603 S.W.2d 551 (Mo. 1980); Ferris v. First Nat'l Bank &

On March 31, 1981, the plaintiffs were awarded judgments against the defendants in amounts totalling $1,370,500.[59] At the time the judgments were entered, the applicable federal statute[60] provided for postjudgment interest to be calculated in accordance with state law.[61] In 1981, South Carolina's statutory rate of interest on judgments was 8¾%.[62] However, subsequent to entry of the judgments, but before satisfaction, the statutory interest rate on judgments was increased to 14%.[63] This amended rate became effective on June 9, 1982.[64]

On October 27, 1982, after exhausting all of their appeals, the defendants tendered payment to the plaintiffs, purportedly to satisfy the outstanding judgments.[65] Payment was made of the principal and postjudgment interest at the rate of 8¾% for the entire period from March 31, 1981 to October 27, 1982. The plaintiffs brought an action in federal court, arguing that they were entitled to interest at the rate of 8¾% from March 31, 1981, to June 9, 1982, and at the rate of 14% from June 9, 1982, to October 27, 1982. Conversely, the defendants contended that the previous statutory interest rate of 8¾% was exclusively applicable to the judgments because they were entered before the effective date of the amended statute and, therefore, that they had fully satisfied the judgments.[66]

Pursuant to Supreme Court Rule 46, the South Carolina Supreme Court agreed to resolve the controversy surrounding the application of the increased interest rate.[67] Because the court's resolution of the novel question affected all judgments that were

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Trust Co., 96 Wis.2d 476, 292 N.W.2d 357 (Ct. App. 1980); Ridge v. Ridge, 572 S.W.2d 859 (Ky. 1978); Ferry v. Ferry, 201 Neb. 595, 271 N.W.2d 450 (1978); Noe v. City of Chicago, 56 Ill.2d 346, 307 N.E.2d 376 (1974); Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 54 Idaho 765, 37 P.2d 407 (1934). *See generally* 45 AM. JUR. 2D *Interest and Usury* § 11 (1969); Annot., 4 A.L.R. 2d 932, 949-52 (1949).

59. 279 S.C. at 175, 303 S.E.2d at 861.

60. 28 U.S.C. § 1961 (1976).

61. 28 U.S.C. § 1961 (1976) provides in part: "Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

62. S.C. CODE ANN. § 34-31-20 (Supp. 1981)(amended 1982).

63. S.C. CODE ANN. § 34-31-20(B)(Supp. 1983) provides: "All money decrees and judgments of courts enrolled or entered shall draw interest according to law. The legal interest shall be at the rate of fourteen percent per annum."

64. *Id.*

65. 279 S.C. at 175, 303 S.E.2d at 861.

66. *Id.*

67. *Id.*

unsatisfied on June 9, 1982, both the South Carolina Trial Lawyer's Association and the South Carolina Defense Trial Attorney's Association petitioned and were granted leave to file amicus curiae briefs.

In its opinion, the court recognized the defendants' contention that statutory enactments are presumed to be prospective in their application absent clear legislative intent or specific provisions to the contrary.[68] The court also agreed that only a remedial or procedural statute is generally held to be applicable retroactively.[69] The court ruled, however, that the legislative intent, as evinced by the clear language of the statute, was to apply the new interest rate to all judgments remaining outstanding on the effective date of the amendment.[70] In addition, the court characterized this application as prospective rather than retroactive because it applied only to the remaining unpaid portions of judgments rather than to the entire amount originally entered.[71] Thus, this opinion rests not only on the intent of the legislature but also on the court's characterization of the application as prospective.

The court's finding that the language of the statute clearly evidences the legislature's intent is peculiarly in the eyes of the beholder. However, the court's second determination, that the application of the amended rate is, in any event, prospective, is clearly within the mainstream of legal thought.[72] The courts which have addressed the issue have overwhelmingly held that the obligation to pay postjudgment interest is created by statute, not by contract, and that changes in the interest rate are simply statutory changes within legislative purview.[73] In contrast, a retroactive law is one which takes away or impairs vested rights.[74] Citing with approval the opinion of the Maryland Supreme Court in *Mayor and the City of Baltimore v. Kelso Corp.*,[75] the court held that the right of a judgment creditor to interest on a judgment, which did not exist at common law, is

68. *Id.*
69. *Id.* at 175-76, 303 S.E.2d at 861.
70. *Id.* at 176, 303 S.E.2d at 861.
71. *Id.*
72. *See supra* note 58.
73. *Id.*
74. Easterby-Thackston, Inc. v. Chrysler Corp., 477 F. Supp. 954, 956 (D.S.C. 1979).
75. 294 Md. 267, 449 A.2d 406 (1982).

intended to compensate the judgment creditor fairly for the damages sustained by nonpayment of the judgment. Because the legislature alone created this right, the opinion continues, the legislature in its wisdom should determine the interest rate necessary to provide fair compensation to judgment creditors.[76]

The semantic characterization of the statute's application as prospective or retroactive is not only a legally satisfying approach to resolving the issue, but it yields a result consistent with the purpose of the statute as well. The purpose of postjudgment interest is to compensate for the loss of monies due and owing to the creditor,[77] and any change by the legislature must be viewed as a recognition that the old rate no longer fairly compensates judgment creditors. Applying a new statutory rate only to those judgments entered after its effective date fails to accomplish the legislative purpose since to do so creates an entire class of judgments which do not receive the benefit of the legislature's decision that an increase is required for fair compensation. A judgment debtor could receive a windfall by delaying satisfaction of a judgment while earning a higher rate of return elsewhere. Thus, judgment creditors could face delays of uncertain duration or be forced to seek judicial remedies to enforce their judgments while judgment debtors take advantage of the disparity between the old and current rate. The effect of the *Michelin Tire* decision, however, is to require all judgment debtors to pay the same statutory interest rate, thereby reducing the incentive to delay the satisfaction of judgments.

Assuming continued increasing interest rates and assuming only minor delays between a statute's creation and its effective date, periodic amendments of section 34-31-20[78] and the court's current interpretation of its application should combine to protect the judgment creditor's financial interests while imposing upon the judgment debtor a reasonably accurate penalty for nonpayment. In periods of radical economic change or when the legislature is slow or reluctant to change the legal interest rate, however, this method of adjustment will not keep up with market interest rates nor will it avoid potential windfalls to either party. Thus, the rationale of *Michelin Tire* also suggests a

76. 279 S.C. at 176, 303 S.E.2d at 862.
77. *Id.*
78. *See supra* note 74.

needed change in South Carolina law.

The concern in *Michelin Tire* was for the judgment creditor who sought to impose interest rates more reflective of the cost of money in an inflationary time. At another point in time, a judgment debtor who is paying interest at the statutorily designated rate could be paying a rate in excess of current commercial rates for the use of money. Legislative machinery is clumsy and cannot react quickly enough to guarantee that both the creditor and debtor will be treated fairly by the statutory interest rate. In addition, frequently changing economic conditions mandate perpetual monitoring and changes by legislative committees, lawmakers and the bar. Were the South Carolina legislature to adopt a variable legal rate of interest, indexed to a reliable economic indicator,[79] the purpose of the legislature would be furthered, while a constant economic concern of the legislators would be removed. Such a statutory scheme would also be consistent with the policy underlying the decision in *Michelin Tire*. Neither the debtor nor the creditor should be penalized, nor should either receive a windfall at the expense of the other. Legitimate appeals should be encouraged and unfair delays discouraged without the need for constant action by the lawmakers. A variable rate of postjudgment interest would serve this purpose by providing a flexible standard, more consistent with the present conditions of the economy.

*George K. Lyall*

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79. For example, the federal statute amending 28 U.S.C. § 1961, effective October 1, 1982 provides in part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshall in any case where, by the law of the state which such court is held, execution may be levied for interest on judgments recovered in the courts of the state. Such interest shall be calculated from the date of entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C.A. § 1961 (Supp. 1983).

## V. PROCEDURAL RULES

### A. *Summons (Complaint Not Served): High Standard of Compliance with Procedural Requirements*

In *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*,[80] the South Carolina Supreme Court held that the plaintiff has the burden of prosecuting his action, and that the trial court may properly dismiss an action for unreasonable neglect in proceeding with a cause.[81] This case reaffirms the court's disapproval of the procedural device of the Summons (Complaint Not Served) and its insistence upon strict compliance with procedural requirements which attach to this type of Summons. These requirements will be enforced even if the result is a dismissal which denies the plaintiff his day in court.

The plaintiffs in *Shevey* sought recovery based upon the alleged wrongdoing of the defendants in connection with an automobile dealership which existed from April 1972 until September 1974.[82] The plaintiffs initiated this action under sections 56-15-10 through 56-15-350 of the South Carolina Code[83] (South Carolina Dealer's Day in Court Act) and, as the genesis of their action, relied upon the service of a Summons (Complaint Not Served) on July 15, 1976.[84] It was undisputed that neither the original Summons nor any other document of the action was filed with the court until October 1977,[85] more than fifteen months after service. No Complaint was served upon the defendants until March 20, 1978.[86] The defendants then removed the case to federal court[87] and answered the Complaint.[88] After sev-

80. 279 S.C. 58, 301 S.E.2d 757 (1983).

81. *Id.* at 60, 301 S.E.2d at 758.

82. Record at 59.

83. S.C. CODE ANN. §§ 56-15-10 to -350 (1976) provide generally for the regulation of manufacturers, distributors, and dealers of motor vehicles.

84. 279 S.C. at 59, 301 S.E.2d at 758.

85. *Id.*

86. *Id.* at 60, 301 S.E.2d at 758.

87. *Id.* at 62, 301 S.E.2d at 759 (Harwell, J., dissenting).

88. One element of the answer was an allegation that the Complaint failed to state a claim upon which relief could be granted because the acts complained of occurred more than four (4) years prior to the service of the Complaint, in violation of the four (4) year statute of limitations provided for the plaintiffs' statutory cause of action in S.C. CODE ANN. § 56-15-120 (1976). The federal court did not rule on this affirmative defense, but the defense did serve as notice to the plaintiffs that the defendants considered the Sum-

eral months of discovery, the case was remanded to state court on February 25, 1980, based upon a finding that complete diversity of citizenship did not exist between the parties.[89]

Based upon the plaintiffs' failure to file the Summons within ten days of service as required by section 15-19-1000 of the South Carolina Code,[90] defendants moved to dismiss the action in March 1980, pursuant to the authority granted to the trial judge by section 15-35-20 of the Code.[91] Because this motion was made almost four years after the defective service and nearly two years after the statute of limitations had expired on the plaintiffs' cause of action, a dismissal, whether with or without prejudice, would preclude the plaintiffs' day in court. The trial court granted the motion for dismissal, stating that to allow the plaintiffs to remain in court on a foundation which included (1) the use of a Summons (Complaint Not Served), (2) the failure to file the Summons for over fifteen months, and (3) the failure to serve and file a Complaint for over twenty months, would be to completely disregard the plaintiffs' burden of proceeding with due diligence.[92] On appeal, the supreme court affirmed by a vote of three to two.[93]

In affirming the trial judge's decision, the supreme court based its ruling on two elements of the same duty. First, the court held that the plaintiff at all times has the burden of prosecuting the action.[94] The defendant may have a right to press for trial but has no duty to do so. Aside from responding to actions taken by the plaintiff, the defendant may remain passive during

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mons (Complaint Not Served) a defective commencement of the action. Record at 62.

89. 279 S.C. at 62, 301 S.E.2d at 760.

90. S.C. CODE ANN. § 15-9-1000 (1976) provides:

> The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof respectively, or the adverse party, on proof of the omission, shall be entitled without notice to an order from a judge that such summons or pleading be filed within a time to be specified in the order or be deemed abandoned.

S.C. CODE ANN. § 15-9-1000 (1976).

91. S.C. CODE ANN. §15-35-20 (1976) provides: "The court may dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants or to proceed in the cause against the defendant or defendants served."

92. 279 S.C. at 61, 301 S.E.2d at 759.

93. *Id.* Justice Gregory joined the dissent of Justice Harwell.

94. *Id.* at 60, 301 S.E.2d at 758.

the litigation.[95] Coextensive with the plaintiff's burden is the trial court's authority to dismiss an action because of a plaintiff's unreasonable neglect in proceeding.[96] This power, the court stated, is necessary to enable trial judges to control and manage their ever-expanding dockets.[97]

Secondly, the court held that in addition to the general duty to prosecute any cause of action, plaintiffs who choose to initiate their cases with the Summons (Complaint Not Served) have always been held to especially high standards of compliance with procedural requirements.[98] This point has been made in a series of South Carolina cases,[99] and particularly in a recent decision[100] in which the court termed the Summons (Complaint Not Served) "barely tolerable and belong[ing] on the lawyer's shelf with rare exception."[101] The court in *Shevey* concluded that although these cases hold plaintiffs who choose to use the Summons (Complaint Not Served) to the highest standard of compliance with pleading and practice requirements, the plaintiffs in *Shevey* failed to meet even the minimum standards of commencing and prosecuting an action.[102]

As reported by the majority opinion, the facts of this case appear to compel this result. The dissenting opinion, however, graphically illustrates that although mitigating factors, such as the disbarment of the plaintiffs' original attorney, a lack of substantial prejudice to the defendants, an expired cause of action and apparent waiver of the procedural defects by the defendants, existed, those factors were not sufficient to overcome the plaintiffs' failure to prosecute the action. Nor did those factors overcome the court's disdain for the Summons (Complaint Not Served). Of the factors which the dissent considered persuasive, the most troubling is the defendants' seeming lack of diligence in capitalizing on the filing deficiency. Other than an indirect

95. *Id.*, 301 S.E.2d at 759 (quoting from Thomas & Howard Co. v. Fowler, 238 S.C. 46, 119 S.E.2d 97 (1961)).

96. *See supra* note 91.

97. 279 S.C. at 60, 301 S.E.2d at 758.

98. *Id.*

99. *See, e.g.*, Richardson Constr. Co. v. Meek Eng'g and Constr., Inc., 274 S.C. 307, 262 S.E.2d 913 (1980); Williams v. Carpenter, 273 S.C. 339, 256 S.E.2d 316 (1979).

100. 274 S.C. at 310, 262 S.E.2d at 915.

101. *Id.*, 262 S.E.2d at 913.

102. 279 S.C. at 61, 301 S.E.2d at 759.

reference in the answer of March 1978, the defendants did not raise the procedural defects until their motion to dismiss in March 1980.[103] Instead, the defendants removed the case to federal court and participated in several pre-trial motions and extensive discovery, waiting almost four years after the service of the Summons to move to dismiss. The dissent recognized that South Carolina case law clearly mandated dismissal without prejudice by the trial judge but felt that the combination of waiver by the defendants and loss of the cause of action by the plaintiffs should intervene to allow proceedings to continue under the original Summons.[104] Labelling the majority's holding as purely technical, the dissent charged that the court's ruling sacrificed substance to form.[105]

The dissent's argument is based on facts unique to this case and does not illustrate a tolerance for the Summons (Complaint Not Served). Rather, it illustrates the lengths to which the supreme court will reach to quash substandard procedural compliance when a party chooses to employ this "barely tolerable" method of commencing an action. By ignoring the defendants' inattention to the defective service and the plaintiffs' loss of their cause of action, and instead taking the opportunity to again remind litigants of their burden to proceed in an action through rigid compliance with the court's rules, this opinion signals in the strongest of terms the disfavored status of the Summons (Complaint Not Served).

Another, more subtle reason may also serve as a foundation for the decision in *Shevey*. The service of a summons commences civil actions in South Carolina under section 15-9-10 of the South Carolina Code.[106] Its purpose is to place the defendant on notice that the litigation has begun.[107] In *Richardson Construction Co. v. Meek Engineering & Construction Co.*,[108] the appellant, in contesting a default judgment award on a Summons (Complaint Not Served), argued a question of due pro-

103. *See supra* note 88.

104. 279 S.C. at 63, 301 S.E.2d at 760 (Harwell, J., dissenting).

105. *Id.*

106. S.C. CODE ANN. §15-9-10 (1976) provides: "Civil actions in the courts of record of this State shall be commenced by service of a summons."

107. H. LIGHTSEY, SOUTH CAROLINA CODE PLEADING 30 (1976).

108. 274 S.C. 307, 262 S.E.2d 913 (1980).

cess.[109] Because the issue was not raised in the trial court, the supreme court declined to consider whether the use of the Summons (Complaint Not Served) reached constitutional dimensions as violative of due process. Although *Meek* involved a default judgment,[110] taken together, *Meek* and *Shevey* may suggest that the court is waiting for an opportunity to strike down the use of a Summons (Complaint Not Served) on a constitutional basis because the device does not properly place the defendant on notice that the litigation has begun.

It therefore appears that practitioners who continue to employ the Summons (Complaint Not Served) do so at their client's risk. Given the plethora of case law expressly questioning its use, an attorney who, for whatever reason, fails to comply strictly with every procedural rule will not be rescued by the court, and thus may be a strong candidate for a malpractice action. The prudent attorney should therefore consider the Summons and Complaint as inseparable.

*George K. Lyall*

### *B. Compliance with Appellate Rules of Procedure Is Critical*

In *Germain v. Nichol*,[111] the South Carolina Supreme Court dismissed the appellant's appeal because of his failure to comply with section 6 of Supreme Court Rule 4 and because he failed to provide a sufficient record of trial testimony.[112] This decision emphasizes the importance of carefully preparing each exception on appeal and endeavoring to comply with all the technical requirements of appellate procedure to avoid summary dismissal.

The evidence at trial established the conversion of respondent's property by the appellant. The evidence of resulting damage to the property was uncontroverted because the appellant was not present at trial and presented no witnesses. The trial court directed a verdict as to liability, leaving only the issue of damages to be determined.[113] The jury was unable to make a determination as to damages and the court, after denying appel-

109. *Id.* at 311 n.1, 262 S.E.2d at 916 n.1.
110. *Id.*
111. 278 S.C. 508, 299 S.E.2d 335 (1983).
112. Record at 1.
113. *Id.*

lant's motion for mistrial based upon a deadlocked jury, directed a verdict of $1,200 in actual damages.[114] Counsel for the defendant excepted to the court's action.[115]

On appeal, the South Carolina Supreme Court dismissed the first three of appellant's four exceptions as violative of section 6 of Supreme Court Rule 4, in that they did not contain a complete assignment of error.[116] Although the court was not specific in explaining how appellant's exceptions violated the rule, prior decisions have defined the applicable requirements.

In *Fruehauf Trailer Co. v. McElmurray*,[117] the court stated that the purpose of an exception is to present some distinct principle or question of law which the appellant claims the trial court has violated, and to present it in a form that will allow it to be properly reviewed.[118] *Fruehauf* requires an appellant to strive for clarity and specificity in presenting the issues on appeal so that the court may easily recognize the questions it is asked to decide.[119] An exception which is general, vague, or indefinite will not suffice,[120] and "[i]n the absence of any proper exception there is nothing properly before the court for review."[121] However, this rule has been ignored in cases where the appellant "has attempted to present a meritorious assignment of

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114. This was the figure respondent's expert placed on the damage. *Id.* at 1-2.

115. *Id.* at 2. Appellant's four exceptions were:

(1) That the Presiding Judge abused his discretion in ordering the jury to return a verdict of special damages.

(2) That the Trial Judge abused his discretion in failing to apply the applicable law in reference to special verdicts.

(3) The Presiding Judge abused his judicial discretion in userpping [sic] rightful duty of the jury, *i.e.* determination of special damages.

(4) That the Presiding Judge further abused his judicial discretion in directing a verdict in the amount of $1,200.00 actual damages against the Defendant when the evidence presented and viewed most favorably as to the Defendant would not justify an award of actual damages in the amount of $1,200.00.

*Id.* at 24.

116. SUP. CT. R. 4, § 6 states in pertinent part: "Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review . . ." and "[e]ach exception must contain within itself a complete assignment of error. . . ."

117. 236 S.C. 141, 113 S.E.2d 756 (1969).

118. *Id.* at 144, 113 S.E.2d at 758.

119. *See also* Brady v. Brady, 222 S.C. 242, 72 S.E.2d 193 (1952).

120. 236 S.C. at 144, 113 S.E.2d at 758.

121. Odom v. County of Florence, 258 S.C. 480, 481, 189 S.E.2d 293, 294 (1972).

error."[122] The court, in ignoring certain technical violations, has shown a willingness to look past the form to the substance of the assignment of error, and to allow the appeal to go forward if the exception presents a meritorious assignment of error. The result is a liberalization of the technical rules in the cases in which the court chooses to waive the breach of the rule and consider the exception. However, the court's enunciated guidelines leave room for wide discretion and for value judgments as to the merits of a case on appeal.

The first three exceptions in *Germain* apparently fail to state specifically the controlling principle of law. In his fourth exception, the appellant claimed that the evidence presented at trial was insufficient to support an award of actual damages.[123] In dismissing this portion of the case, the court reasoned that the appellant had the burden of providing the court with a record sufficient to enable it to decide the issues presented by the appeal. The court then concluded that the appellant had not satisfied this burden because he failed to provide the court "with any of the trial testimony."[124] Citing *Wilson v. American Casualty Co.*,[125] the court effectively held that where an exception requires the consideration of evidence adduced at trial, and this evidence is not included in the transcript of record, the exception will not be considered.[126]

The holding in *Germain* represents a continued willingness on the part of the South Carolina Supreme Court to strictly enforce the rules of appellate procedure and to summarily dismiss appeals which do not comply with these rules. To avoid summary dismissal, practitioners should make certain that every exception contains a complete and specific assignment of error and that a complete record of the proceeding below is provided to the court. While the supreme court has broad discretion in applying these technical rules of appellate procedure, it would be unwise to depend on the court's recognition of the merits of an

122. Aaron v. Hampton Motors, Inc., 240 S.C. 26, 37, 124 S.E.2d 585, 590 (1962); *see also* 222 S.C. at 246, 72 S.E.2d at 194-95.

123. 278 S.C. at 509, 299 S.E.2d at 335.

124. *Id.*

125. 252 S.C. 393, 166 S.E.2d 797 (1969).

126. *Id.* at 397, 166 S.E.2d at 798.

appeal. Only complete technical compliance will protect the practitioner.[127]

*Fred L. Kingsmore, Jr.*

127. In addition, the court noted that, "[I]n the Statement of the case appellant concedes that respondent's evidence was uncontroverted.". The court then held that, "The parties are bound by the Statement of the case." 278 S.C. at 509, 299 S.E.2d at 336.